Supreme Court, U.S.
FILED
AUG 8 1991
OFFICE OF THE CLERK

(2)

No. 91-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL W. BARNETT, *et al.*,
Petitioners,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Respondent.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 8, 1991

QUESTIONS PRESENTED

1. Whether a local school board that offers an admittedly appropriate and high-quality special education program to a small number of students in a centrally-located regular school is compelled by the Individuals with Disabilities Education Act (formerly the Education of All Handicapped Children Act, "EHA"), or by § 504 of the Rehabilitation Act of 1973 ("§ 504"), to duplicate that program for a single student at another school that is located a few miles closer to the student's home.

2. Whether a local school board that has always provided an appropriate and high-quality special education program enabling a hearing-impaired student to be completely mainstreamed at a regular high school near his home, should be liable for over $100,000 in tort damages under the EHA, § 504, or 42 U.S.C. § 1983, solely on account of that student's alleged emotional distress at not having the program duplicated for him at the school closest to his home.

3. Whether this Court's holding in *Lytle v. Household Manufacturing Co.* requires reversal of the Court of Appeals' decision, even though the material facts relating to the School Board's compliance with the EHA and § 504 were not in dispute, and neither the EHA nor § 504 provides for a trial by jury.

4. Whether the Court of Appeals correctly held that the Petitioners had the burden of proving that the School Board violated the EHA and § 504.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Fairfax County School Board (the "School Board"), files this Brief in Opposition to the Petition for Writ of Certiorari to respond to the arguments raised by the Petitioners, Michael Barnett ("Michael") and his parents.

GROUNDS OF JURISDICTION

Michael graduated from high school in June, 1991. He is no longer entitled to educational services from the School Board, and, therefore, his claim for injunctive relief is moot. *Honig v. Doe*, 484 U.S. 305, 317-18 (1988).

For the reasons set forth in this Brief in Opposition, and in the opinions of the Court of Appeals and District Court below, Michael has no right to recover monetary damages for emotional distress.

STATEMENT OF THE CASE

(1) Nature of the Case

This is an appeal by a profoundly hearing-impaired young man, Michael Barnett, and his parents, from the adverse decisions of a State Administrative Hearing Officer, the District Court, and the U.S. Court of Appeals for the Fourth Circuit. The Petitioners object to the School Board's special education placement of Michael. They concede that the special education program offered by the School Board was not only appropriate but of "high quality." Nonetheless, they contend that the School Board was legally required to duplicate this program at a school slightly closer to their home. They seek more than $100,000 in "emotional distress" damages because the School Board did not agree to do so.[1] They assert purely statutory claims based on the Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act), 20 U.S.C. §§ 1400-1485 (1988) (the "EHA"); § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) ("§ 504"); and Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988) ("§ 1983").

(2) Course of Proceedings

Petitioners instituted an administrative hearing in 1988 to challenge the School Board's refusal to duplicate its Cued Speech program at Michael's base school. Although a local hearing officer ruled in their favor, the State Administrative Hearing Officer reversed. Petitioners then filed their Complaint in federal district court in April, 1989, appealing the decision of the State Administrative Hearing Officer.

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[1] Petitioners now try to couch this case as a demand for interpreter service only, but that was not the basis upon which it was litigated. From their initial request to the school system, throughout the administrative hearing, and in their Complaint, Petitioners sought to compel the School Board to duplicate the ***entire*** program, including interpreter service, resource assistance, and speech therapy. Petitioners did not seek reimbursement for any private interpreter services.

Petitioners sought mandatory injunctive relief to compel the School Board to provide Michael at his base school all the services that he had been receiving at the mainstreamed but centralized program. Petitioners also sought monetary damages for emotional distress in excess of $100,000.00.

On August 25, 1989, the District Court struck Petitioners' damages claims and demand for a jury trial, allowing the claims for equitable relief to go forward for a bench trial. The case was tried on August 30, 1989. On September 7, 1989, the court issued Findings of Fact and Conclusions of Law. It held that the School Board had offered Michael an appropriate education in the least restrictive environment.

In a per curiam opinion, the Court of Appeals for the Fourth Circuit affirmed the District Court's ruling that the School Board was not required to duplicate the Cued Speech program at Michael's base school under either the EHA or § 504.

Following the adverse judgment of the District Court, Petitioners voluntarily withdrew Michael from the Cued Speech program. In June, 1991, Michael graduated from high school and received a regular high school diploma.

(3) Statement of Facts

Michael is an eighteen-year-old young man who suffers from profound hearing loss. While in elementary and secondary school, he was eligible for special education as a "hearing-impaired" student.

At the time Michael began first grade, the Fairfax County School Board offered a choice of two methodologies to hearing-impaired students: the traditional "Total Communication" approach (in which communication takes place in signed English), and the "Auditory/Oral" approach (in which communication takes place strictly by the use of lip-reading and residual hearing). Several parents, including Michael's, requested that the School Board develop a third program utilizing the relatively new and not widely employed "cued speech" methodology. This method uses an interpreter to repeat the words spoken by the classroom teacher and to provide manual cues to assist the hearing-impaired student to read the interpreter's lips.

The School Board responded by creating its Cued Speech program at a network of centrally-located regular schools at the elementary, intermediate (seventh and eighth grades) and high-school levels. The schools are situated close to one another and to major transportation arteries. They make up a natural feeder network so that students may advance through the grades together with their non-handicapped classmates.

Michael thrived in the Cued Speech program, earning high grades and making friends. With the assistance of Cued Speech interpreters, resource teachers and speech and language therapy, Michael gradually spent more and more time in regular, "mainstream" classes. By eighth grade, Michael was main-streamed for all of his academic classes, and he generally received grades of "A" or "B" in all subjects.

Michael remained in the Cued Speech program when he entered high school. The Cued Speech program at the high school level was located at Annandale High School ("Annandale"), one of Fairfax County's 24 regular high schools. During his ninth and tenth grade years at Annandale, Michael took a rigorous academic program entirely in regular classes with non-handicapped students. Michael excelled at Annandale. He continued to do well in his classes, and he participated in demanding extracurricular activities as a member of the baseball and basketball teams. Michael testified that he got along well with his classmates and teammates, and continued to be motivated in sports and in school.

Nonetheless, Michael and his parents preferred that he attend West Springfield High School ("West Springfield"), which was located five miles closer to Michael's home than Annandale. Michael's parents demanded that the School Board duplicate the Cued Speech program at West Springfield (including the interpreter services, resource teachers, and speech and language therapy). The School Board could not comply with this demand. Its decision to centralize some of its programming to serve the needs of some special education students was compelled by several educational and practical factors.

First, centralizing the specialized personnel and resources enabled the School Board to offer a selection of programs and services it could never otherwise provide. Fairfax County is one of only five school districts out of 14,000 nationwide that offers a

choice of three different methodologies for teaching hearing-impaired students.

Second, the School Board's Cued Speech program is a comprehensive, integrated program that involves much more than interpreter services. Students receive speech and language therapy from a certified clinician, and resource assistance from specially trained teachers of the hearing-impaired. The program is overseen by a single administrative staff that hires, trains and schedules interpreters. The staff also monitors and supervises all the resource teachers, therapists, audiologists, and other personnel. This supervision ensures the continued high quality of the program and could not be maintained if the services were spread out among the many individual schools around the county.

Third, centralization permits the limited number of qualified interpreters to be shared. In the Cued Speech program, for example, there are only three full-time interpreters, five part-time interpreters and one substitute to serve the 22 cued speech students at the preschool, elementary, intermediate, and high school levels. Similarly, only 12 sign-language interpreters are available to serve the 56 hearing-impaired students in the Total Communications program.[2] Centralizing these programs allows the limited number of available interpreters to serve all of the students who need them.[3] This is critical, since students in the Cued Speech and Total Communication programs come from base schools not only from across Fairfax County but from other jurisdictions as well. In addition, the central location permits interpreters to substitute for one another in the event of absences, or to substitute at the other schools where Cued Speech programs are located.

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[2] These constraints are not unique. The School Board knows of no school system in the country that provides full-time cued speech interpreter service to students in their base schools. The testimony of Elizabeth Fleetwood, upon which Petitioners' rely for the notion that the school system in Montgomery County, Maryland, provides interpreters for students in their base schools, in fact supports the opposite conclusion. Ms. Fleetwood testified that Montgomery County has a center-based Cued Speech program. Her daughter received interpreter service there only part-time, not full time as Michael did. Ms. Fleetwood knew of no student who received full-time interpreter service in his base school.

[3] Because there are more cued speech students than interpreters, students in the program do not have one "dedicated interpreter" who could just as easily be

The Petitioners do not dispute that qualified interpreters are in short supply. Witnesses for both Michael and the School Board described the many ways in which the School Board has tried unsuccessfully to find more. In spite of these efforts, the School Board was unable to cover several of Michael's classes when interpreters were absent. If Michael and the other students who needed interpreters were required to be educated at their base schools, it would be impossible for the School Board to supply them with interpreter services.[4]

Finally, centralization provides many important educational advantages and benefits. It allows the resource teachers, speech and language therapists, and other special education staff to share information and to interact with and support one another on a regular basis. It also allows the regular teaching staff to build more experience serving hearing-impaired students. These advantages cannot be duplicated by providing a student with periodic assistance of itinerant resource teachers or therapists.

Because Annandale is about 5 miles farther away from Michael's home than is West Springfield, Michael's placement entailed some additional travel time. According to Michael and his mother, that additional time averaged about 21 minutes each way per day, or about 3 ½ hours per week. Still, this trip took less time than Michael's commute to elementary or intermediate school. Indeed, many students in Fairfax County travel much farther distances to attend their base schools. Many others, for a variety of reasons, do not attend the school geographically closest to their home.

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assigned to a base school. In 9th and 10th grade, for example, Michael was served by three different interpreters every day. These interpreters were available only part-time, or spent other parts of their days with other students at Annandale, or at other schools. Similarly, a centrally-based resource teacher of the hearing-impaired, such as those at Annandale, can serve as many as 24 students. A resource teacher who services more than one school can attend to only 7 or 8 students.

[4] While, the precise number of additional students interested in interpreter service at their base school could not be determined, a conservative estimate was that the demand would require tripling the number of interpreters currently employed.

Petitioners have always been totally satisfied with the substance of the individualized education program (IEP) that was developed for Michael. They concede that the Annandale Cued Speech program is "appropriate" and of "high quality." Their sole complaint is with the location of the services.

SUMMARY OF ARGUMENT

The School Board complied with the educational placement requirements imposed by the EHA. The Petitioners concede that the Cued Speech program at Annandale was appropriate and of high-quality. They contend only that the School Board was required to reproduce this program at Michael's base school, which was located five miles closer to his home. Centralizing the cued speech program at a regular high school did not violate the EHA. The EHA expresses a preference for "mainstreaming," and Michael was fully mainstreamed. Moreover, while the EHA regulations require that geographical proximity be taken into account when making special education placement decisions, they do not compel a school system to reproduce a small, resource intensive centralized program at the public school closest to the child's home. Centralization provides educational benefits that could not otherwise be obtained. More importantly, the school system could not possibly provide interpreter services to each hearing-impaired student who demanded to attend his base school.

The School Board also complied with § 504. It did not segregate Michael from non-handicapped students, but successfully integrated him while simultaneously meeting his special education needs. Moreover, the School Board's compliance with the more demanding requirements of the EHA conclusively established its compliance with the less demanding standards of § 504.

The $100,000 in emotional distress damages sought by the Petitioners under the EHA and § 504 are not available as a matter of law. While the EHA permits a court to exercise its equitable powers to award reimbursement type relief, tort damages are simply not available. Tort damages are also unavailable under § 504, particularly where, as here, there is no evidence of intentional discrimination. The Petitioners cannot circumvent these damages limitations by the convenience of pleading their

statutory claims through the "and laws" provision of § 1983.

Since the Petitioners failed to establish any statutory violation, the Court of Appeals did not need to address their damages claim or demand for a jury trial. In any event, the material facts were not in dispute and did not require a jury to resolve. Neither the EHA nor § 504 provide for a jury trial, and the administrative structure of the EHA is inconsistent with the use of a jury.

Finally, the Petitioners properly bore the burden of proving that the School Board violated the EHA and § 504. As a practical matter, however, the allocation of the burden of proof did not affect the outcome below.

The Court of Appeals' decision did not create any split in the Circuits, and review by this Court is not warranted.

ARGUMENT

I. The School Board Complied with the EHA by Offering Michael Cued Speech Services at Annandale.

Petitioners argue that the School Board violated Michael's rights under the EHA by offering him Cued Speech interpreters, resource teachers, and speech and language therapy at Annandale, but not at West Springfield, as he would have preferred. The pertinent statutory provisions and authorities demonstrate that the School Board offered Michael an educational program that not only complied with but surpassed its responsibilities under the EHA.

A. The School Board's Program at Annandale Enabled Michael to be Fully Mainstreamed in a Regular School.

No authority supports the Petitioners' contention that the EHA required the School Board to duplicate its Cued Speech program for Michael alone at West Springfield. The EHA provision they rely upon provides that states must establish:

> (B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other

> care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . . .

20 U.S.C. § 1412(5)(B) (1988). This provision articulates a preference for "mainstreaming" handicapped children with regular education students. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 & n.4 (1982); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983); *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 294 (7th Cir.) (involving a request for cued speech services), *cert. denied*, 488 U.S. 925 (1988).

It is undisputed, however, that Michael was completely and successfully mainstreamed at Annandale. Annandale was not a "center" attended only by hearing-impaired or other handicapped students; it was a regular public high school. The Cued Speech program enabled Michael to be totally integrated with non-handicapped students for his academic classes as well as for his nonacademic activities. Michael could not have been any more mainstreamed at West Springfield than he was at Annandale. Accordingly, the requirements of this statute were met.

The Petitioners also rely on an administrative regulation interpreting the EHA that provides, in relevant part:

> Each public agency shall ensure that:
>
> (a) Each handicapped child's placement:
>
> * * *
>
> (3) is as close as possible to the child's home;
>
> * * *
>
> (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped;

34 C.F.R. § 300.552 (1990). The official comment to this regulation makes clear that this provision requires only that a school board take geographical proximity into account when it makes placement decisions, and that, where more than one appropriate program exists, the school board provide the one closest to the child's home. *Id.* In this case, Michael's IEP required the Cued Speech program. That program is available at Annandale, and there is no school nearer than Annandale that has Cued Speech services. Accordingly, the School Board's placement complied with this regulation as a matter of law. *See Pinkerton v. Moye*, 509 F. Supp. 107, 112 (W.D. Va. 1981) (observing that the regulation only requires that geographical proximity be one factor taken into account). The court in *Pinkerton* held that, in view of the finite resources available for the education of handicapped children, a school system need not duplicate a small, resource-intensive centralized program at a child's base school. *Id.* at 113-14. This reasoning is directly applicable here.

In Fairfax County, there are at least 78 other hearing-impaired students who use or will use interpreter services. If an exception were made for Michael, these other students would rightfully expect to be provided with their own individual interpreter and support services at their base schools. The Petitioners do not dispute that the School Board would be unable to provide such services. Instead, they argue that the Court should consider only the additional burden of providing such services to Michael at his base school, without considering the impact that this decision would have on the rights of the other students. The lower courts have rejected precisely this limited and unrealistic perspective,[5] and this Court should as well.[6]

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[5] *Troutman v. School Dist. of Greenville County*, EHLR Dec. 554:487, 490 (D.S.C. 1983); *Pinkerton*, 509 F. Supp. at 112-13.

[6] The cases cited by the Petitioners are totally inapposite. These cases involved claims by parents that their child should be mainstreamed in a regular classroom. *See, e.g., Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989) (mentally retarded child placed exclusively with other handicapped children); *Department of Educ. v. Katherine D.*, 727 F.2d 809, 812 (9th Cir. 1983) (child with cystic fibrosis provided only homebound program),

B. The School Board Fully Met Its Obligation to Offer a Placement Based Upon Michael's Individual Needs.

Although the Petitioners endorsed the substance of Michael's IEP, they contend that only the individuals on the IEP team could decide where to locate the special education program. They argue that the School Board failed to respect their desire to establish the Cued Speech program at West Springfield. This argument is without support. Educational placement under the EHA is the responsibility of the "public agency" (i.e., the school board). *See* 34 C.F.R. § 300.552. This Court has admonished that, in policing the requirements of the EHA, courts must be careful to avoid imposing their views of preferable educational methods upon the states. *Rowley*, 458 U.S. at 207. This stands to reason, since it is the school system that must allocate its scarce resources among numerous handicapped students, and that is responsible for structuring and administering its special education services in a coherent and educationally beneficial fashion. A school board can and must consider the effect of providing the requested services upon the resources available to other handicapped students. *See, e.g., Roncker*, 700 F.2d at 1063; *Katherine D.*, 727 F.2d at 813.

Petitioners attempt to argue that the School Board has engaged in illicit "categorical placement" by providing Cued Speech services at certain mainstreamed but centrally-located schools. "Categorical placement" refers to situations where only a single placement option exists for an entire category or categories of handicapped students. *Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia*, II B. 1 c) 1), at 29. Far from offering only one placement alternative for hearing-impaired students, the School Board has offered an entire spectrum, including residential schools, self-contained classes, and classes in regular schools. These alternatives include programs that utilize interpreters, and programs that do not. The School Board has offered students (including Michael) a choice of not one, but ***three*** different

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cert. denied, 471 U.S. 1117 (1985). In none of these cases did the parents seek to have the school system move an already-mainstreamed program to accommodate the child's desire to attend a particular school.

communication methodologies to enable them to take advantage of the school system's regular education opportunities. Indeed, this array of choices far surpasses what is required under the EHA. *See Lachman*, 852 F.2d at 297 (local school board that offered hearing-impaired student educational program employing "Total Communication" did not need to offer Cued Speech at all). Michael's placement at Annandale was not a "categorical placement" in the slightest.[7]

II. The School Board Complied with § 504.

The Petitioners also contend that the School Board violated § 504 of the Rehabilitation Act of 1973 because Michael was "excluded" from his base school. Section 504 prevents recipients of federal financial assistance from unlawfully discriminating against otherwise qualified handicapped persons under any of their programs. 29 U.S.C. § 794. The School Board complied with § 504 in this case because it provided Michael with all the benefits of its educational program, and it satisfied the more demanding requirements of the EHA.

A. Michael Was Not Excluded from Any Program.

The School Board fully and completely assimilated Michael into the regular classroom environment, while simultaneously accommodating his need for special interpreter services. Far from being "discriminatory," the School Board's program is a model of what a thoughtful and creative school system can accomplish.

Both the District Court and the Court of Appeals recognized that Petitioners' § 504 claim is foreclosed by this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, the Court held that a nursing college did not discriminate against a hearing-impaired student by refusing to provide her with a nursing instructor and by excusing her from courses made difficult because of her hearing impairment. This

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[7] Michael's IEP addressed in detail all areas of Michael's educational needs, including vocabulary, reading comprehension, written language, and many areas of speech. His IEP provided for extensive mainstreaming, based upon his success in regular classes. This program fully considered his individual needs.

Court unanimously rejected the student's argument that these extra efforts were mandated by § 504. Without delving into the cost that would be imposed on the college to provide such services, the Court simply held that such "affirmative action" was not required by the "language, purpose, [or] history of § 504. . . ." *Id.* at 411. The same conclusion is required here.

Unlike the nursing student in *Davis*, Michael was provided with his choice of learning methodologies available to hearing-impaired students. Only four other school districts in the United States can offer as wide a selection. Moreover, Michael has participated fully and completely in the educational program offered by the School Board, and he has been completely mainstreamed with non-handicapped students.

If the college's failure to provide a nursing instructor to the hearing-impaired student in *Davis* did not violate § 504, it is difficult to conceive how the School Board's plenary efforts to accommodate Michael could possibly violate the statute. The School Board has gone well beyond the minimum "evenhanded treatment" that was the aspiration of § 504's drafters. *Id.* at 410; *Alexander v. Choate*, 469 U.S. 287, 304 (1985).

The Petitioners assert that this Court's decisions in *Choate* and in *School Bd. of Nassau Co. v. Arline*, 480 U.S. 273 (1987), have altered the proper analysis under § 504. At one point, Petitioners cite *Choate* for the remarkable proposition that the only program modifications ***not*** required by § 504 are those that would "jeopardize" the very integrity of those programs.[8] This is not the law.[9] This Court has never required a recipient under § 504 to demonstrate that its entire program would be "jeopardized" in order to avoid liability under this Spending Clause statute.

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[8] Petition for Certiorari at 26.

[9] *See Choate*, 480 U.S. at 300 (only "reasonable modifications" are required by the statute and regulations); *id.* at 300 n.20 ("Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' or that would constitute 'fundamental alteration[s] in the nature of a program'") (citations omitted); *Smith v. Robinson*, 468 U.S. 992, 1018 (1984) (*Davis* "emphasized that § 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons.").

The Petitioners also claim that *Davis* was "apparently overruled" by *Arline*, 480 U.S. 273, 289 n.19 (1987). Far from "overruling" *Davis*, however, the Court in *Arline* cited from it at length, explaining that "[a]ccommodation is ***not reasonable*** if it either imposes 'undue financial and administrative burdens' on a grantee,' or requires 'a fundamental alteration in the nature of [the] program." *Id.* at 287 n.17 (*citing Davis*, 442 U.S. at 410, 412) (emphasis added). These tests were amply satisfied in this case.

Requiring the School Board to provide every hearing-impaired student like Michael with his interpreter of choice at his base school, instead of at mainstreamed but centralized locations, would constitute a substantial and fundamental modification of the School Board's educational program. *Davis*, 442 U.S. at 410; *Choate*, 469 U.S. at 300 n.20; *Arline*, 480 U.S. at 287 n.17; *accord* 34 C.F.R. §§ 104.33(d), 104.34(a), (b) (1990).[10] Both the District Court and the Court of Appeals found, as a matter of law, that § 504 does not require such radical alterations.

B. Compliance with the EHA's Educational Placement Requirements Conclusively Establishes Compliance with § 504.

The District Court was also correct in holding that the School Board's compliance with the EHA's educational placement requirements conclusively established its compliance with § 504. The EHA imposes specific, affirmative burdens on school boards to provide handicapped children with an appropriate educational placement. Both this Court[11] and the lower courts[12] have held that the more general provisions of § 504 add nothing to the specific obligations created under the EHA.

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[10] *See also Wimberly v. Labor & Indus. Relations Comm'r of Missouri.*, 479 U.S. 511, 517 (1987) (§ 504 generally does not mandate affirmative efforts to overcome the disabilities caused by handicaps); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 640 & n.27 (1986) (same).

[11] *Smith*, 468 U.S. at 1018-19.

[12] *See, e.g., DeVries*, 882 F.2d at 880 (compliance with EHA demonstrated compliance with § 504 under facts of case); *St. Louis Developmental Disabilities Treatment Center Parents Ass'n v. Mallory*, 591 F. Supp. 1416, 1471

Moreover, the administrative regulations promulgated under § 504 confirm that one method of complying with § 504's educational placement requirements is by complying with the EHA. 34 C.F.R. §§ 104.33(b)(2), 104.35(d), 104.36 (1988). Indeed, the § 504 regulations pertaining to "Educational Setting" mirror the EHA regulations. *Compare* 34 C.F.R. § 104.34(a), *with* 34 C.F.R. §§ 300.550, 552 (1990).

Because the School Board's placement of Michael in the mainstreamed program at Annandale was proper and non-discriminatory under the EHA, the Petitioners are foreclosed from attacking this conclusion by invoking the less rigorous standards of § 504.

III. Monetary Damages for Alleged Emotional Distress Cannot be Awarded in This Case.

Because the Court of Appeals concluded that the Petitioners failed to establish a violation of Michael's statutory rights, it did not need to reach the question of whether the emotional distress damages sought by the Petitioners are available under the EHA or § 504. Nonetheless, such damages are unavailable under either statute as a matter of law.

A. The EHA Precludes Recovery of Tort Damages.

It is well-settled that the EHA does not permit recovery of tort-type compensatory damages for emotional distress, and Petitioners cite no case to the contrary. Petitioners' argument that such damages should now be recoverable ignores this Court's decision in *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985), and the cases that have followed it, including

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(W.D. Mo. 1984) ("compliance with Section 504 is less demanding than is compliance with the Education Act. That being the case . . . when the Section 504 claim concerns a facet of the education of handicapped children covered by the Education Act, such as the educational program or placement, a showing of compliance with the latter satisfies the former."), *aff'd*, 767 F.2d 518 (8th Cir. 1985); *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340, 1346-47 (N.D. Ill. 1983) ("§ 504 certainly cannot impose any greater educational requirements on the states than does the EHA").

Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985).

The EHA's remedies are equitable in nature. Where a school board has failed to provide an appropriate educational program, the court may invoke its "equitable" powers to order a school district to reimburse parents for their private tuition expenses. *Burlington*, 471 U.S. at 374. However, such equitable remedies are fundamentally distinct from monetary awards for tort damages. In fact, the Court in *Burlington* expressly distinguished between the two kinds of relief. 471 U.S. at 370 ("the Town repeatedly characterizes reimbursement as 'damages,' but that simply is not the case."); *see also Hall*, 774 F.2d at 633 n.3 (drawing same distinction).

The Petitioners' reliance on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and on *Davis v. Passman*, 442 U.S. 228 (1979), is misplaced. Both of these cases involved the question of whether a common law action for money damages could be brought in federal court for violations of the federal Constitution.[13] The Court in *Passman* held that the *Bivens* line of cases was ***inapplicable*** to determining what relief is available for the enforcement of federal ***statutes***.[14]

The first and still most comprehensive analysis of the availability of monetary damages under the EHA was performed by the Seventh Circuit in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981). In *Anderson*, parents sued for monetary damages under the EHA, claiming that the school board had not provided their daughter with an appropriate education. The Seventh Circuit exhaustively examined the EHA's legislative history, as well as the applicable policy considerations. The Court first observed that to allow recovery of damages in special education cases would

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[13] *Bivens*, 403 U.S. at 397 (recognizing damages remedy for violation of Fourth Amendment); *Passman*, 442 U.S. at 248-49 (recognizing damages remedy for violation of Due Process Clause of Fifth Amendment); *but see Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.").

[14] *Passman*, 442 U.S. at 241. The proper analysis for determining the scope of federal statutory remedies is contained in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-24 (1979).

create a cause of action for "educational malpractice" that Congress plainly did not intend. 658 F.2d at 1211. The EHA's sponsors recognized the inherent difficulty and uncertainty of providing special education programming to meet the complex needs of handicapped students. *Id.* at 1212. The court noted that "it would be incongruous for Congress to subject school systems to liability for damages each time a court disagreed with the school district's program while at the same time admitting the uncertainty of diagnosis in the field." *Id.*

Second, the *Anderson* court noted that Congress was concerned about the lack of available funds for education. Mindful of the limits on educational resources, the court concluded that the EHA's drafters did not wish to overtax the limited budgets of school systems by allowing large, retrospective damage awards. *Id.* at 1212-13.

Finally, the court observed that public policy militated against allowing recovery of compensatory damages against school boards acting in good faith, even where it later turned out that the school district should have offered a different educational placement. To allow damages in such cases would chill the flexibility and experimentation necessary in the special education field, ultimately to the detriment of handicapped students. The court concluded that compensatory damages were not recoverable. *Id.* at 1213.

The persuasive analysis of *Anderson* has been followed in many subsequent cases.[15] By contrast, the Petitioners have cited no case in which a court has awarded emotional distress damages under the authority of the EHA.

B. Damages for Emotional Distress are Not Available Under § 504.

In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984), this Court held that "§ 504 authorizes a plaintiff who alleges ***intentional discrimination*** to bring an ***equitable*** action for ***backpay***." (Emphasis added). The Petitioners are asking this

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[15] *See, e.g., Hall*, 774 F.2d at 633 n.3 (EHA permits reimbursement remedy, but "does not create cause of action for educational malpractice").

Court to enlarge dramatically the narrow holding of *Darrone*, in order to allow the recovery of emotional distress damages resulting from ***un***intentional acts that have a purportedly disparate impact on handicapped persons. This position is at odds with this Court's prior holding in *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582 (1983), and contrary to the Title VI remedies that Congress explicitly directed be used under § 504.[16]

Although there was no single majority opinion in *Guardians*, five justices agreed that equitable relief in the form of backpay, if available at all under Title VI, could be recovered ***only*** upon a showing of intentional discrimination.[17] By contrast, the Petitioners are seeking tort damages, not equitable relief. Moreover, they have not produced any evidence of intentional discrimination against Michael. Accordingly, the Petitioners have no right to recover emotional distress damages under § 504. This Court need not reach the other damages questions left open in *Guardians*.

C. The HCPA Does Not Make Tort Damages Available Under § 1983 for Violations of the EHA or § 504.

Although damages for emotional distress are unavailable under the EHA and § 504, the Petitioners contend that they can recover such damages by asserting these statutory claims separately through § 1983. Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. As a matter of law, however, tort damages are unavailable in this case because (1) the remedial schemes created under the EHA and § 504 are sufficiently comprehensive to dem-

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[16] 29 U.S.C. § 794a(a)(2) ("The remedies, procedures, and rights set forth in title VI of the Civil Rights Acts of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under § 504 of this title."); *Darrone*, 465 U.S. at 626.

[17] *Guardians*, 463 U.S. at 602-03 (White, J., joined by Rehnquist, J.) (injunctive and declaratory relief only available remedies for disparate impact discrimination; backpay available, if at all, only upon showing of discriminatory animus); *id.* at 610-11 (Powell, J, joined by Burger, C.J., Rehnquist, J., concurring) (no violation of statute absent proof of discriminatory intent); *id.* at 612 (O'Connor, J., concurring) (same).

onstrate Congress' intent to preclude the remedy of parallel suits under § 1983, and (2) even if a cause of action were available under § 1983, a tort-damage remedy is inappropriate to protect the rights created by the EHA and § 504.

1. Section 1983 Does Not Allow This Solely Derivative Claim:

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that § 1983 provided a cause of action for the deprivation of federal statutory rights. The Court's decisions since *Maine* have recognized an exception to this general principle where the underlying statute provides a remedial scheme that is sufficiently comprehensive to demonstrate Congress' intent to preclude the remedy of suits under § 1983.[18] This exception applies here. This Court has repeatedly held that the EHA and § 504 provide such comprehensive schemes.[19] Moreover, as explained above, a damages remedy would be fundamentally inconsistent with the remedial purposes of these statutes.

The Petitioners contend that Congress intended tort damages to be recoverable when it passed the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (the "HCPA"). Nothing in the text or legislative history of the HCPA supports this position.[20]

Congress enacted the HCPA to overturn certain aspects of this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). The

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[18] *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 28-29 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 19-20 (1981); *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448-49 (1989); *Wilder v. Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2516-17 (1990).

[19] *Dellmuth v. Muth*, 491 U.S. 223, 225 (1989) ("The [EHA] enacts a comprehensive scheme to assure that handicapped children may receive a free public education appropriate to their needs."); *Smith v. Robinson*, 468 U.S. 992, 1016 (1984) ("The EHA is a comprehensive scheme designed by Congress as the most effective way to protect the right of a handicapped child to a free appropriate public education."); *Darrone*, 465 U.S. at 626 ("The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot of the handicapped.").

Court in *Smith* held that attorney's fees were unavailable under the EHA. The Court reasoned that, while attorney's fees were available in an action brought either under § 504,[21] or under § 1983 based on a violation of the Equal Protection Clause,[22] the EHA provided the far more comprehensive remedial scheme with respect to educational placement decisions. Accordingly, the Court held that the EHA provided the ***exclusive*** vehicle for asserting rights that are protected by the EHA. *Id.* at 1013.

Justice Brennan dissented. He urged that the EHA be reconciled with § 504 and § 1983. The dissent interpreted the EHA only to require exhaustion of administrative remedies ***before*** a plaintiff could file a § 504 or § 1983 action, under which attorney's fees could then be recovered. *Id.* at 1024 (Brennan, J., dissenting).

In enacting the HCPA, Congress adopted Justice Brennan's position.[23] Section 2 of the HCPA provided that prevailing EHA plaintiffs could recover attorney's fees, although the allowable fees are subject to extensive restrictions not applicable to cases brought under § 1983. *See* 20 U.S.C. § 1415(e)(4)(B)-(G) (1988). Section 3 of the HCPA added a "savings clause" to the EHA. 20 U.S.C. § 1415(f) (1988). This "savings clause" provided that nothing in the EHA should be construed to limit "the rights, procedures and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children. . . ." *Id.* It also required exhaustion of the procedural requirements under the EHA before any other claim could be brought seeking relief that was also available under the EHA. *Id.* This section thus overruled *Smith*'s holding that the EHA foreclosed resort to § 504 claims, or to § 1983 claims based upon the Constitution.

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[20] *See* Sido & King, *Monetary Remedies Under the Education of All Handicapped Children Act: Toward a New Civil Rights Act*, 23 Tort Ins. L. J. 711, 729-33 (1988) (concluding that Congress did not intend the HCPA to provide damages remedies for EHA violations).

[21] *See* 29 U.S.C. § 794a(b) (1988).

[22] *See* 42 U.S.C. § 1988 (1988).

[23] *See* S. Rep. No. 112, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1799.

Although the HCPA allowed EHA plaintiffs to bring § 1983 actions based upon the *Constitution*, nothing in the legislative history supports the notion that EHA claims can now be asserted redundantly through the "and laws" provision of § 1983.[24] The Court of Appeals did not need to reach this issue. Other federal courts have had little occasion to address the scope of the HCPA.[25] Nevertheless, several factors compel the conclusion that Congress did not intend for the HCPA to permit the recovery of large, tort-like damage awards for violations of the EHA or § 504.

First, *Smith* was not an "and laws" case,[26] and the dissent in *Smith* never contended that the EHA could or should be enforceable through § 1983. Justice Brennan focused on the majority's decision to foreclose the recovery of attorney's fees under the EHA, and to preclude EHA plaintiffs from bringing § 504 or ***constitutional*** claims. In fact, the dissent apparently assumed that the EHA and § 504 were comprehensive remedial schemes that

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[24] There was no discussion of the "and laws" issue in the floor debates, which focused principally on the attorney's fees amendment. *See, e.g.*, 132 Cong. Rec. S9,277 (daily ed. July 17, 1986) (statement of Sen. Weicker) ("What we do here today is to make the Education of the Handicapped Act consistent with more than 130 other fee shifting statutes which provide for the award of attorneys' fees to parties who prevail in court to obtain what is guaranteed to them by law.").

[25] Two courts have interpreted the HCPA to allow EHA claims to be asserted through § 1983, but both cases involved requests only for injunctive or declaratory relief. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 775 (2d Cir. 1987); *Digre v. Roseville Schools Indep. School Dist.*, 841 F.2d 245, 249-50 (8th Cir. 1988). Other courts have found that the EHA remains a comprehensive remedial scheme, completely foreclosing parallel § 1983 claims, *Lawson v. Edwardsburg Pub. School*, 751 F. Supp. 1257, 1261 (W.D. Mich. 1990); or that compensatory damages may be recovered only if the plaintiff brings a constitutional claim in addition to his EHA claim, *Begay v. Hodel*, 730 F. Supp. 1001, 1010 (D. Ariz. 1990) (*Bivens* damages allowed for constitutional violations, but not if there is only an EHA violation). In the case relied on by the plaintiffs, *Board of Educ. v. Diamond*, 808 F.2d 987, 996 (3d Cir. 1986), the court did not specify what kind of damages were involved, nor did it distinguish between damages based on constitutional violations from those predicated solely on the EHA.

[26] *Smith*, 468 U.S. at 1004-05 ("In this case, petitioners made no effort to enlarge the remedies available under the EHA by asserting their claim through the "and laws" provision of § 1983.").

would ***not*** serve as independent predicates for § 1983 actions.[27] Congress did not adopt a contrary position.

Second, when Congress enacted the HCPA in 1986, the "overwhelming majority of cases" had precluded the recovery of compensatory damages under the EHA.[28] Congress said nothing about overruling those cases. If it had intended to, Congress could have easily amended the EHA to provide for tort damages, just as it amended the EHA to allow for the recovery of attorney's fees.[29]

Third, allowing EHA plaintiffs to assert identical EHA claims through § 1983, and, consequently, to recover attorney's fees under 42 U.S.C. § 1988 (1988), would totally circumvent the specific limitations that Congress imposed on the recovery of fees in EHA cases. *See, e.g.*, 20 U.S.C. §§ 1415(e)(4)(C) (1988) (providing that no bonus or multiplier may be used for fees recovered under EHA); 1415(e)(4)(D) (1988) (relating to parents who reject settlement offers).

Fourth, Congress would have been aware in 1986 that the "savings clause" enacted in § 3 of the HCPA would not suffice to create § 1983 actions based solely on duplicative EHA claims. *See Middlesex County Sewage Auth. v. National Sea Clammers*, 453 U.S. 1, 20 n.31 (1981) (rejecting identical argument that "savings" clauses were intended to refer to redundant § 1983 claims based upon the same statutory claim). Had Congress intended a contrary result, or if it had intended for EHA plaintiffs to recover tort damages, "we would expect to find some evidence of that intent in the statute or its legislative history. We find none."[30] Indeed, the 101st and 102d Congress hotly debated

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[27] *See Smith*, 468 U.S. at 1023 n.2 (Brennan, J., dissenting).

[28] Sido & King, *supra* note 20, at 730.

[29] Notably, both the House and the Senate Reports remarked that the HCPA would have some effect on the budgets of state and local governments because it would force them to pay attorney's fees to successful EHA litigants. S. Rep. No. 112, 99th Cong., 2d Sess. 3-4, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1800-01; H.R. Rep. No. 296, 99th Cong., 1st Sess. 10-11 (1985). The Committee Reports said nothing about the impact of compensatory damage awards, although some congressmen did question whether allowing the recovery of attorney's fees for EHA administrative proceedings would impose undue costs on school systems. *See* H.R. Rep. No. 296, *supra* at 16-17.

whether to amend the Civil Rights Act of 1964 to provide for compensatory damage awards and jury trials. These debates make clear that Congress does not believe that § 504 currently provides these remedies.[31]

2. Petitioners Cannot Utilize § 1983 to Obtain Remedies Inconsistent with the EHA and § 504.

Even assuming *arguendo* that Petitioners could bring a § 1983 claim based entirely upon a violation of the EHA or § 504, a compensatory damages remedy would still be unavailable. This Court has emphasized that the kind of damages available for violations of § 1983 varies according to the particular substantive right involved. *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978). The remedies available for the violation of one right secured by § 1983 "are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 265.[32] Since Petitioners' § 1983 claim is identical to their EHA and § 504 claims,

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[30] *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989). The Petitioners' quotation from the House Conference Report is somewhat misleading. H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 7, *reprinted in* 1986 U.S. Code Cong. & Admin. News 1798, 1809 ("It is the conferee's intent that actions brought under § 1983 are governed by this provision."). This passage refers to the decision of the House to recede to the Senate's version of the EHA exhaustion requirement. The quotation cannot be taken to mean anything more than that Congress intended an exception to the general rule in § 1983 cases that exhaustion is not required before instituting suit.

[31] *See e.g.*, H.R. Rep. No. 40, 102d Cong., pt. 1, at 146 & n.17 (1991) (listing § 504 as one of the many existing statutes that does not provide for punitive and compensatory damages); H.R. Rep. No. 40, 102d Cong., pt. 2, at 68 (1991) ("Under present law, title VII damages are limited to back pay, reinstatement and other injunctive relief. Jury trials are not available for violations of title VII.").

[32] *See also Guardians*, 463 U.S. at 602 n.23 (White, J., joined by Rehnquist, J.) ("Damages indeed are usually available in a § 1983 action, but such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute."); *Bivens*, 403 U.S. at 409 n.9 ("the appropriateness of money damages may well vary with the nature of the personal interest asserted.") (Harlan, J., concurring).

the restrictions on the recovery of damages inherent in those statutes would also limit the remedy, if any, available under § 1983.

IV. The Court of Appeals' Decision Comports with *Lytle v. Household Manufacturing*

Confronted with dispositive factual findings against them by the District Court below, the Petitioners now attempt to escape the consequences of those findings by arguing that they should have had a jury trial.[33] The Petitioners rely on this Court's recent decision in *Lytle v. Household Mfg.*, 110 S. Ct. 1331 (1990). *Lytle* is inapposite to the facts of this case.

First, the Court of Appeals did not need to reach the jury trial issue because there were no disputed material facts that required a jury to resolve. *Cf. Lytle*, 110 S. Ct. at 1338 (evidence sufficient for a jury to find discrimination under the facts presented). The Petitioners conceded that the Cued Speech program at Annandale provided Michael with an appropriate and high-quality program. There was also no dispute that Cued Speech interpreters are extremely scarce, and that the School Board could not provide interpreters at each base school for the many students who might desire one. On the basis of these concessions, the Court of Appeals found, as a matter of law, that neither the EHA nor § 504 required the School Board to duplicate the Annandale program at West Springfield.

Second, even if Petitioners were entitled to sue for compensatory damages, the structure of the EHA's judicial review provision demonstrates that the *court*, not a jury, determines whether a school board has complied with the EHA. 20 U.S.C. § 1415(e)(2) (1988). Section 1415(e)(2) sets forth the manner in which aggrieved parties may seek judicial review of a state administrative decision:

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[33] The Petitioners took a somewhat contrary position in their brief to the Court of Appeals, arguing that they were entitled to judgment as a matter of law.

> In any action brought under this paragraph ***the court*** shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision upon a preponderance of the evidence, shall grant such relief as *the court* determines is appropriate.

20 U.S.C. § 1415(e)(2) (emphasis added). The statute entrusts to "the court" (***not*** "to the court or jury"), the responsibility of receiving and reviewing the administrative record and decision. In reviewing that decision, the district court does not conduct a *de novo* trial. Rather, it is required to give the review officer's decision "due weight." *Rowley*, 458 U.S. at 206. By contrast, nothing in § 504 or Title VI provides for a jury trial and, as noted above, compliance with the EHA establishes compliance with § 504.

The statutory structure of the EHA thus forecloses resort to a jury trial. The Seventh Amendment does not require a jury trial if, as here, it would be inconsistent with the statutory scheme. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 455-56 (1977) (Congress may create new statutory obligations, and provide an administrative and judicial enforcement scheme, without the intervention of a jury at any stage); *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 51 (1989) ("Congress may devise novel causes of action invoking public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.").

The Court of Appeals did not need to reach the jury trial issues under *Lytle* because there were no issues of fact in this case that required a jury to resolve. Moreover, the Fourth Circuit has not departed from this Court's holding in *Lytle*. *See Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991) (following *Lytle*). This case presents no occasion for revisiting the recent *Lytle* decision.

V. The Petitioners Properly Bore the Burden of Proof.

Among their assignments of error, the Petitioners also argue that the District Court and Court of Appeals improperly saddled them with the burden of proving that the School Board violated the EHA and § 504. Although the actual allocation of the burden of proof was immaterial in this case, the Petitioners properly bore the burden because they were the plaintiffs in the district court.

In EHA cases, the party challenging an adverse state administrative decision properly bears the burden of proof. *Spielberg v. Henrico County Pub. Schools*, 853 F.2d 256, 258 n.2 (4th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989). This rule comports with this Court's statement in *Rowley* that state administrative decisions must be accorded "due weight." 458 U.S. at 206. The two cases relied upon by the Petitioners to demonstrate a purported split in the circuits did not even involve a student's appeal from adverse state administrative findings.[34]

The Petitioners similarly misapprehend the proper analysis under § 504. They assume that they have established a "prima facie" case of discrimination under § 504, and then jump to the conclusion that the burden of proof to show non-discrimination should have shifted to the School Board. The flaw in this claim is that, under *Davis*, no such "prima facie" case was made. Michael was not excluded from the regular educational program but was fully assimilated into it. The cases relied upon by the Petitioners are, therefore, inapposite. In each of those cases, the handicapped person was, in fact, excluded from the regular program offered by the recipient of federal financial assistance.[35]

In short, although it was not a dispositive factor in the decisions below, the "burden of proof" was properly borne by the Petitioners.

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[34] *Grymes v. Madden*, 672 F.2d 321 (3rd Cir. 1982) (school board's withdrawal of funding in violation of the EHA's "stay-put" provision); *S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir.) (standard for disciplining handicapped student), *cert. denied*, 454 U.S. 1030 (1981).

[35] *See, e.g., New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644 (2d Cir. 1979) (exclusion of mentally retarded children with hepatitis from

CONCLUSION

The Court of Appeals' decision did not create a split in the Circuits, and review by this Court is not warranted. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FAIRFAX COUNTY SCHOOL BOARD

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regular classroom); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977) (exclusion of one-eyed children from contact sports).